IN THE MATTER OF THE HUMAN RIGHTS CODE, R.S.O. 1990, c. H.19

And in the matter of the Complaints of Kathleen Lewis, by her next friends, Robert and JoAnn Lewis, dated April 22, 1985. and March 13, 1986, pursuant to section 32 of the Human Rights Code, alleging discrimination in services on the basis of handicap and constructive discrimination by the York Region Board of Education, Her Majesty the Queen in Right of Ontario, the Ministry of Education, J. Laughlin and R.A. Cressman

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Board of Inquiry: - M.R. Gorsky

Appearances:

For the Ontario Human Rights Commission - Ms. C. Pike
Counsel

For the Complainant - Mr. D. Baker
Counsel

For the Respondents, York Region Board of Education, R.A. Cressman and J. Laughlin
- Ms. B. Bowlby
- and Ms. M. Mackinnon
Counsel

For the Respondent Her Majesty the Queen in Right of Ontario, the Ministry of Education
- Mr. John Bell
- and Ms. D. Goldberg
Counsel

INTERIM DECISION

This interim decision is with respect to the application of counsel for the Complainant challenging the constitutional validity of section 16(1)(a) of the Human Rights Code 1981 S.O. 1981 c.53 (hereinafter the Code).

Counsel for the Complainant, in his opening statement, advised me that if the Respondents relied upon the defense contained in s.16(1)(a) of the Code, then this application would be made.

Counsel for the Complainant submitted that s.16(1)(a) of the Code does not apply to the complaints, and if it was found to apply, I should find that it was inconsistent with s.15(1) of the Canadian Charter of Rights and Freedoms (hereinafter the Charter) and was of no force and effect in these proceedings according to s.52(1) of the Constitution Act, 1982.

An issue having been raised, I directed that written submissions be made to me as to my jurisdiction to apply the Charter in the circumstances described.

The following submissions were made by counsel for the Complainant:

1. In 1981 the Code was amended to include, for the first time, protection for persons with disabilities.

2. A defense to a complaint of discrimination was contained in s.16(1)(a), which is as follows:

> A right of a person under this Act is not infringed for the reason only,
>
> > (a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap,
> >
> > (b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

3. Section 16(1)(b) was not set out in the submissions of counsel for the Complainant and I include it for the sake of completeness.

4. Ontario's Equality Rights Statute Law Amendment Act S.O. 1986, c.64, which received Royal Assent on December 18, 1986, and was proclaimed on April 18, 1988, repealed the previous section 16 [now section 17] and substituted the following:

> 16(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.
>
> (2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accomodating those needs considering the cost, outside sources of

> funding, if any, and health and safety requirements, if any.
>
> (3) The Commission, a board of inquiry or a court shall cosider any standards prescribed by the regulations for assessing what is undue hardship.

5. Reliance was had on section 15(1) of the Charter:

> Equality Rights
>
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

6. Section 15 of the Charter came into force on April 17, 1985 pursuant to the provisions in s.32(2) of the Constitution Act, 1985.

7. Reference was made to Re Blainey and Ontario Hockey Association et al. (1986), 54 O.R. (2d) 513 (C.A.) leave to appeal to S.C.C. refused June 26, 1986, for support for the proposition that where a member of an enumerated category of persons is denied the protection and benefit of the Code by reason of a statutory exclusion contained in the Code, that exclusion can be inconsistent with s.15(1) of the Charter.

8. Reliance was had on s.52(1) of the Constitution Act, which provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of

> the Constitution, is, to the extent of the inconsistency of no force or effect.

9. While acknowledging that the Charter does not have "retroactive effect," it was submitted that:

> Section 15(1) of the Charter came into effect during the 'relevant period' of the 1984-85 school year. It is submitted that both the special education placement and the regular education placement offered to Kathleen Lewis by the Respondent board were ongoing acts of discrimination. Throughout the relevant period. [sic] The [sic] Lewis family continued to assert Kathleen's right to attend a school other than the Fairmead School For The Trainably Retarded throughout the relevant period. Attempts were made to have her attend kindergarten in May of 1985.

From the argument of counsel for the Complainant, I took it that he also acknowledged that the Charter does not have retrospective effect. In any event, I find this to be the case. The issue is: Does the interpretation pressed by counsel for the Complainant call for an impermissible retrospective or a permissible prospective application of the Charter to the facts before me?

10. Reference was made to Dudnik v. York Condominium Corp. No. 216 (1988), 9 C.H.R.R. D/5080 (Bd. of Inq.) (hereinafter Dudnik). This was a preliminary decision concerning the jurisdiction of the Board of Inquiry. The Board's final decision was reported at (1990), 12 C.H.R.R. D/325 and reversed in part in (1991), 3 O.R. (3d) 360 (Div. Ct.). The subsequent history of the decision does not affect the Board's determination that it had jurisdiction to consider a Charter issue.

11. The Board of Inquiry held that it had jurisdiction to make a determination under s.52(1) of the Charter that relevant provisions in the Code violated the Charter. The Board of Inquiry stated at D/5082:

> ... there are several practical reasons why this interpretation is appropriate. First, it is best not to split issues, which would be necessary if only a court could determine the Charter issues. Second, there would be a consequential duplication of evidence in this event with attendant added costs. Third, given the specialized function of a human rights tribunal, it would seem that the most appropriate forum in the first instance to a Charter challenge is the tribunal hearing itself, where the constitutional challenge can be put in the context of the overall evidence.
>
> This Board of Inquiry must, of course, determine what the law is as a prerequisite to applying the law. This means that we must not only construe and interpret legislative enactments, but also whether such enactments are constitutionally enacted. If it is concluded that a given provision is unconstitutional then it follows that the Board of Inquiry must then determine the matter before it as if the offending statutory provision has no force or effect.

12. Counsel for the Complainant viewed the Dudnik decision as being based on two ideas. First, the Board of Inquiry considered that it was an interpreter of statute law and could therefore determine if such a statute complied with the highest law, namely the Charter. Second, there were practical considerations why dealing with the Charter issue at the Board of Inquiry level was a preferred procedure.

13. Support for Dudnik was said to be found in: Shreve v. Windsor (City) (1993), 18 C.H.R.R. D/363 at D/366; and Leshner v. Ontario No. 2 (1992), 16 C.H.R.R. D/184 at D/201.

14. Reference was made to a number of Supreme Court of Canada cases as supporting the Dudnik decision.

15. Reference was made to Douglas/Kwantlen Faculty Association v. Douglas College, [1990] 3 S.C.R. 570, 13 C.H.R.R. D/403 (hereinafter Douglas College cited to C.H.R.R.).

16. The Douglas case concerned the jurisdiction of a labour arbitrator to apply the Charter to a collective agreement.

17. LaForest J. held, at D/421, that under the statutory provision empowering the arbitrator to "... interpret and apply any Act intended to regulate employment relationship[s]," the arbitrator had jurisdiction over the remedy sought (i.e. the non-operation of the collective agreement), the parties and the subject matter (i.e. the interpretation of the collective agreement in accordance with the Charter), and, therefore, the arbitrator could consider the application of the Charter to the collective agreement.

18. LaForest J., stated at D/425:

> ... if there are disadvantages to allowing arbitrators or other administrative tribunals to determine constitutional issues arising in the course of exercising their mandates, there are clear advantages as well. First and foremost, of course, is that the Constitution must be respected. The citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution ... . There are clear advantages to presenting these issues to the tribunal. The issue may be raised at an early stage in the context in which it arises without the

> citizen having first to resort to another body, a court which will often be more expensive and time consuming .... I do not think a person should be compelled to have such issues resolved on a more elevated plane.
>
> There are, as well, clear advantages for the decision-making process in allowing the simple, speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court. It is important, in this as in other issues, to have the advantage of the expertise of the arbitrator or agency. That specialized competence can be of invaluable assistance in constitutional interpretation.

19. Reliance was also had on Cuddy Chicks Ltd. v. Ontario Labour Relations Board, [1991] 2 S.C.R. 5 (hereinafter Cuddy Chicks), where the Court held that the OLRB had jurisdiction to determine whether part of its enabling statute violated the Charter and to treat such a provision as having no force or effect. The Court determined that the OLRB had jurisdiction over the parties, the subject matter and remedies before it. LaForest J., held, at p. 15, that, since the subject matter and remedy in the case were premised on the application of the Charter, authority for the OLRB to apply the Charter to the Labour Relations Act must be found in the enabling statute. The Court found that the OLRB had been given the express power to interpret law and, consequently, that it had the power to consider constitutional law. The Court re-iterated that practical considerations were important when conferring the power to interpret the Charter on an administrative tribunal. In this case, the OLRB was considered to be a specialized tribunal of high calibre (at p. 17).

20. Reference was made to Canada Employment and Immigration Commission v. Tétreault-Gadoury, [1991] 2 S.C.R. 22 (hereinafter Tétreault-Gadoury), which considered the absence of express statutory authority to authorize a tribunal to interpret and apply law. The applicant was challenging a provision of the Unemployment Insurance Act which denied normal coverage to persons aged 65 or more. An appeal from an unfavourable decision of the Board of Referees lay to an Umpire. However, in the case, the applicant applied to the Federal Court of Appeal for judicial review. The Board of Referees had no express statutory authority to consider questions of law, whereas the Umpire did.

LaForest J., held, at p. 32:

> Therefore, where the legislature has already spoken on the question, that will normally be the end of the inquiry. Where it has not, it will be necessary to examine other factors as well.

21. At pp. 34-35, LaForest stated:

> While this assessment of the comparative expertise or practical capability of the Board [of Referees] may well be correct, it cannot outweigh the intention expressed by the legislature to give the power to interpret law to the umpire and not to the Board of Referees. In other words, I find that, notwithstanding the practical capability of the Board of Referees, the particular scheme set up by the legislature in the Unemployment Insurance Act, 1971 contemplates that the constitutional question should more appropriately have been presented to the umpire on appeal, rather than to the Board itself.

LaForest J. concluded, applying the test set forth in Douglas College and Cuddy Chicks, that the Board of Referees, while it had

jurisdiction over the parties in the case, did not have jurisdiction over the subject matter and the remedy.

22. It was submitted that the Code provides a comprehensive system for protecting human rights in Ontario, reference being to Board of Governors of Seneca College v. Bhadauria, [1981] 2 C.H.R.R. D/468 at D/470.

23. Reference was made to s.35(1) of the Code:

> Where the Commission fails to effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may request the Minister to appoint a board of inquiry and refer the subject-matter of the complaint to the board.

24. Reference was made to s.38(2) of the Code, which gives a board of inquiry jurisdiction over the parties. Section 38(1) provides that a board shall hold a hearing to determine whether a right has been infringed under the Code. Section 40 gives a board of inquiry extensive powers to grant a remedy.

25. Reference was made to s.46(2) of the Code as having primacy over other legislation, unless the legislation specifically provides that it is to apply notwithstanding the Code.

26. Reference was made to the status of a board of inquiry as a quasi-judicial decision-making body with an expertise in human rights matters and to the fact that a record of its proceedings is

maintained pursuant to s.39 of the Code. Reference was made to the right of appeal to the Divisional Court based on the record of proceedings before the board of inquiry pursuant to s.41 and to the right to bring an appeal on a question of fact or law or both.

27. It was submitted that a board of inquiry has jurisdiction over the parties, the subject matter and the remedies necessary for it to consider a challenge to s.16(1)(a) of the Code made under s.52(1) of the Constitution Act, 1982.

28. It was also submitted that, as a practical matter, the Constitutional issue only arose after the board of inquiry made a prima facie finding of discrimination and held that the respondents could avail themselves of the defense contained in s.16(1)(a).

29. It was further submitted that initiating an action or application in the courts at that stage would not provide the Complainant with a speedy, inexpensive and readily accessible proceeding favoured by the Supreme Court of Canada.

30. It was also submitted that the matter could not be fully resolved by a court since the Respondents could still assert that they could not have accommodated the Complainant without undue hardship: a matter within the exclusive jurisdiction of the Board of Inquiry.

31. By determining the Charter issue at the Board of Inquiry level, the parties would not be required to participate in three separate processes, and a determination could be made in the context of the human rights case.

32. Counsel for the Complainant indicated that he did not propose to call any witnesses to deal exclusively with the constitutional issue raised. Reference was made to calling the evidence of Catherine Frazee, who would "additionally" be asked to testify on the impact of denying persons with disabilities the access and amenities they require to achieve equality of opportunity and equal protection and benefit of the law.

33. In the light of the subsequent repeal of s.16(1)(a) of the Code, it was submitted that it could be anticipated that the evidence to be called in relation to s.1 of the Charter would be "manageable."

34. The order sought by the Complainant was that the Board of Inquiry conclude that it had jurisdiction to consider a s.15(1) Charter challenge to s.16(1)(a) of the Code pursuant to s.52(1) of the Constitution Act, 1982.

Submissions of the York Region Board of Education et al.

The following submissions were made by counsel for the noted Respondents (herein referred to collectively as YRBE).

1. For the purpose of this case, YRBE did not dispute that, in general, boards of inquiry appointed under the Code have jurisdiction to consider Charter issues. YRBE submitted, however, that on the unique facts of this case this Board of Inquiry lacks jurisdiction to deal with the particular Charter issue raised by the Complainant.

2. The first area dealt with by counsel for YRBE was with respect to the retrospectivity of the Charter.

3. It was noted that the human rights complaints at issue in this proceeding relate to the special education placement of the Complainant, Kathleen Lewis, at Fairmead School for the Trainably Retarded for the school year commencing in September, 1984.

4. Reliance was had on the fact that s.15 of the Charter did not become effective until April 17, 1985, and authority was presented for the proposition that the Charter was not to be given retrospective effect: specific reference being given to Sandhu v. Mann (1986), 34 D.L.R. (4th) 717 (B.C.S.C.); and to Re The Queen In Right Of Ontario and Ontario Public Service Union (1986), 34 D.L.R. (4th) 637 (Div. Ct.).

5. It was submitted that in determining whether or not a particular construction requires an adjudicator to give a statute retrospective effect, a distinction had to be drawn between a "past event" and a "status" or "characteristic" which arises before the effective date of the legislation, and reference was made to E.A. Driedger, Construction Of Statutes, 2d ed. (Toronto: Butterworths, 1983) at 191-2:

> When can it be said that a construction gives retrospective effect to a statute? In all but the simplest enactments there is set out what may be called the fact-situation, namely, the facts that bring the rule of law into operation.... These facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment.

6. YRBE's position was that the allegations of discrimination at issue in the complaints relate to past events and not to any status or characteristic. The events giving rise to the complaints: the decision of the I.P.R.C. ("Indentifaction Placement and Review Committee") that the appropriate educational placement for Kathleen Lewis was in a developmental class at Fairmead School and the subsequent acts of the York Region Board of Education as a result of that decision took place before s.15 of the Charter came into effect. It was submitted that this Board must apply the law as it

existed at the time the noted events occurred, and that it cannot apply the Charter to these events in a retrospective manner.

7. Reference was made to para.12 of the Complainant's submissions where it was alleged that the fact situation at issue in this case involves "ongoing acts of discrimination" throughout the 1984-85 school year, and, accordingly, it followed that since s.15(1) of the Charter came into force during the relevant school year, it would not be a retrospective application of the Charter to apply s.15(1) in the present case.

8. YRBE submitted that the Complainant's characterization of the fact situation was not an appropriate one in the circumstances in this proceeding. What was said to have occurred here was a discrete event, identified as the determination of the special education placement by the I.P.R.C., giving rise to a potential complaint under the Code.

9. Reference was made to the evidence of Mrs. Lewis, Kathleen Lewis's mother, who testified that she wished the I.P.R.C.'s determination to be made prior to her daughter commencing school. It was submitted that once that determination had been made and Kathleen Lewis found to be "exceptional," the issue between Mr. and Mrs. Lewis, on behalf of their daughter, and YRBE related to the special education placement and not whether or not Katie Lewis's status was that of a handicapped person. Reference was made to the

fact that no suggestion had been made that Kathleen Lewis could be placed in a kindergarten class or any other placement without special education programs and supports. The continuing issue identified by counsel for YRBE from the point of the I.P.R.C. determination onwards, was the nature of the placement which was appropriate "and" the nature of the special education program and services. (The emphasis of the word "and" was contained in the submissions of YRBE.)

10. Although it was acknowledged that the discrete event of the I.P.R.C.'s decision had continuing consequences for Katie Lewis, it was alos submitted that the event gave rise to the complaints and not the consequences that followed from the event. It was emphasized that as the event in question - the special education placement by the I.P.R.C. - took place prior to the effective date of s.15(1) of the Charter, it would be an impermissible retrospective application of the Charter to apply it to the facts in question in this case.

11. Reference was made, again, to the Sandhu and OPSEU cases as supporting the proposition that where all the events giving rise to a cause of action (or complaint) occurred prior to the effective date of s.15(1) of the Charter, the application of the Charter to those events would represent a retrospective application, even if the consequences of such events continued after the effective date.

12. YRBE therefore submitted that the application of s.15(1) of the Charter in the present case would constitute an impermissible, retrospective application and, as a result, the Board of Inquiry had no jurisdiction to consider the s.15(1) arguments made on behalf of the Complainant.

Reply to the Submissions of YRBE

In his reply to the submissions of YRBE, counsel for the Complainant, in dealing with the subject of the retrospective application of the Charter, made the following submissions:

1. While agreeing with the submission of the Complainant that the Charter could not apply retrospectively to the period prior to April 17, 1985 with respect to a Charter challenge based on s.15(1), it was submitted that an application of the Charter with respect to Kathleen Lewis's placement in a segregated school setting on and after April 17, 1985 did not amount to an attempt to apply the Charter retrospectively.

2. Reference was made to the case of R. v. Gamble, [1988] 2 S.C.R. 595.

3. In Gamble, an accused had been sentenced in August 1976 to life imprisonment without eligibility for parole for the first 25

years under legislation that had come into force in July of 1976. The offense had been committed in March 1976 when the law at that time would have sentenced the accused to life imprisonment with no eligibility for parole between 10 and 20 years of imprisonment. After 10 years of imprisonment the prisoner made a motion for a writ of habeas corpus claiming that her s.7 Charter rights to life, liberty and the security of the person were being infringed by her continued ineligibility for parole.

4. The prisoner in Gamble argued that her s.7 rights were being violated by the current operation of the parole ineligibility, regardless of the fact that her parole ineligibility arose from a sentence imposed prior to the enactment of the Charter. Speaking for the majority, Wilson, J., stated at pp. 625-6:

> In approaching this crucial question it seems to me preferable for the courts to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre [sic] and post-Charter. Frequently an alleged current violation will have to be placed in the context of its pre-Charter history in order to be appreciated.

5. Reference was also made to the statement of Wilson J. at pp. 627-8:

> Another crucial consideration will be the nature of the particular constitutional rights alleged to be violated ....
>
> Such an approach seems to me to be consistent with our purposive approach to the interpretation of constitutional rights. Different rights and freedoms, depending on their purpose and the interests they are meant to protect, will crystallize and protect the individual at different times....

> Some rights and freedoms in the Charter seem to me to be particularly susceptible of current application even although such application will of necessity take cognizance of pre-Charter events. Those Charter rights the purpose of which is to prohibit certain conditions or states of affairs would appear to fall into this category. Such rights are not designed to protect against discrete events but rather to protect against an ongoing condition of state of affairs. Pre-trial delay under s.11(b) is a good example [citation omitted]. Section 15 may also fall into this category.
>
> (Emphasis added in the argument of counsel for the Complainant)

6. It was noted that Wilson J. adopted the comments of the Ontario Court of Appeal in Re McDonald and the Queen (1985), 51 O.R. (2d) 745, (leave to appeal refused 1986), 52 O.R. (2d) 688 (S.C.C.), as authority for the statement that s.15 might also fall into the category noted by her.

7. In McDonald, a 16 year old committed a crime and was tried in adult court. Prior to trial, the age limit defining a young offender was raised to 18. The Charter's equality rights also came into force after the age limit was raised, but prior to trial. The accused argued that his equality rights were being infringed because he was being tried as an adult, rather than as a young offender. Although the Court of Appeal disposed of the case on other grounds, it addressed an argument raised by the Crown that to apply the Charter to this case would be to give a retrospective application of the Charter. In disagreeing with the Crown, Morden J.A., speaking for a unanimous bench, stated at p. 762:

> The respondent [the accused] does not seek what he submits is a retroactive or retrospective application of

> s. 15, that is, he does not ask to have the steps taken in the proceedings against him before April 17, 1985, set aside or declared void. Rather he says that his submission involves an entirely prospective application of the Charter. He seeks only the benefits of the Young Offenders Act that would be applicable from April 17, 1985, forward. He submits that regardless of what the case was before April 17, 1985, there is now a situation of inequality that infringes s. 15 and that this requires a remedy. I believe that this argument is sustainable on the authorities [citations omitted].

8. It was submitted that the Supreme Court of Canada and the Ontario Court of Appeal had held that the Charter applies to an ongoing state of affairs existing after April 17, 1985 which was caused by pre-Charter events. In the case before me, it was submitted that the Complainant was placed in a segregated school setting in September 1984 and that this placement was ongoing and continued beyond April 17, 1985 when s.15 of the Charter took effect. It was further submitted that the parents of the Complainant made attempts between May 23 and May 27, 1985 to have her admitted into an integrated school setting, but were advised that their daughter would have no option but to attend the Fairmead School for the Trainably Retarded.

9. Reference was made to the Sandhu case relied upon in the Respondents' submissions where the plaintiff suffered a work-related injury in January 1985 and sought, without success, to raise s.15 of the Charter in a proceeding commenced in July 1985.

10. Reference was also made to the OPSEU case referred to in the Respondents' submissions where an employee was dismissed from her

employment in 1984, and sought to raise the Charter in a 1985 proceeding, also unsuccessfully.

11. It was submitted that in Sandhu and OPSEU, once the injury (in the first case) or the dismissal (in the second case) had occurred, there were no re-occurrences of the same event. Apart from the litigation, there was no further relationship between the parties that had arisen from the injury or dismissal.

12. It was submitted that the Complainant's case is entirely different from the cases cited by YRBE. It was submitted that the Complainant's entitlement to a placement with YRBE in the segregated school setting started in September 1984, but continued each day after April 17, 1985. Thus the Complainant's case was analogous to the "ongoing state of affairs" discussed by the Supreme Court in Gamble and the Ontario Court of Appeal statement in McDonald. If the Charter were applied to the Complainant's placement in a segregated school after April 17, 1985, the Board of Inquiry would not be engaging in a retrospective application of the Charter.

Discussion and Decision

1. One of the most respected and distinguished scholars and practitioners in the area of statutory construction, the late Elmer

A. Driedger, identified as: "One of the most difficult problems in the process of statutory construction... the application of the presumption against the retrospective operation of statutes." In his seminal article "Statutes: Retroactive Retrospective Reflections" (1978), 41 C.B.R. 264, he detailed the intellectual process undertake by him to "clarify" his "own thinking" over a period of time leading to the publication of his article, which was to arrive at a "workable answer" to a number of problems which required conclusions to be arrived at with respect to the meaning of retroactive statute, retrospective statute, prospective statute and the presumptions that apply or do not apply in the case of retrospective statutes.

2. At p. 269, he notes some difficulties created where the difference between retroactive and retrospective statutes is not maintained:

> I had always known that there was a difference, even though in the dictionaries the definition of each word includes the other, and in the decisions the two words are often equated and used interchangeably. I did not previously attach any particular significance to the difference, but I discovered that unless a clear distinction is made between the two words, there is bound to be confusion. Thus, a statute could be retroactive but not retrospective, retrospective but not retroactive, or both retroactive and retrospective; and both retroactive statutes and retrospective statutes could be and usually are, prospective also. The presumption applies to both, but the test of retroactivity is different from that of retrospectivity. For retroactivity the question is: Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity the question is: Is there anything in the statute to indictate that the consequences of a prior event are changed, not for time before its enactment, but

> henceforth from the time of enactment, or from the time of its commencement if that should be later. [sic]

3. It is significant that Mr. Driedger, in outlining, over a period of time, his developing understanding, was frank in acknowledging the difficulty of conveying to lawyers a basis for understanding the concept of retrospectivity and the applications of his rules to assist in solving real problems.

4. His work on the subject, especially the noted article, have been frequently favorably referred to in articles and court decisions. However, as helpful as his work has been ongoing difficulties remain in coping with the practical problems of dealing with the retrospective application of statutes. These difficulties are reflected in the decisions of the courts. These difficulties are also faced by me.

5. At pp. 268-9, Driedger states:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute <u>operates backwards</u>. A retrospective statute <u>operates forwards</u>, but it looks backwards in that it attaches new consequences <u>for the future</u> to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. (Emphasis in original)

6. At pp. 269-70, Driedger states:

> In my 1974 <u>Supplement</u> I took one further step in trying to clarify my own thinking, and what I have said earlier, namely, that only if an enacted law attaches an

obligation or disability or imposes a duty as a new consequence of a prior event, can it be said to be retrospective. An example I gave was the statute considered in Nadeau v. Cook, which provided that:

> Where any person recovers in any court in the province a judgment for an amount exceeding one hundred dollars, exclusive of costs, in an action for damages resulting from bodily injury to, or the death of, any person occasioned by, or arising out of, the operation or use of a motor vehicle by the judgment debtor, upon the determination of all proceedings including appeals ... such judgment creditor may ... apply by way of originating notice to a judge of the Supreme Court of Alberta for an order directing payment of the judgment out of the [Unsatisfied Judgment] fund. ...

Judgment for damages was recovered after the statute was enacted, but the accident giving rise to the action occurred before. The court held that the application of the statute to the judgment was not a retrospective one. Ford J. said that the words "damages resulting from ... the operation or use of a motor vehicle" defined the cause of action and did not have a limiting effect. Here, the enacted law was a consequence of the judgment and not of the accident; the fact-situation on which the enactment operated was the recovery of the judgment. (Emphasis in original)

7. At p. 270 Driedger states:

> In conducting my lectures in the following year, I realized that I still did not have the complete answer. I now realized that there are three kinds of statutes that can properly be said to be retrospective, but only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Secondly there are those that attach prejudicial consequences to a prior event; they attract the presumption. Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption.

8. At pp. 271-2, Driedger deals with the difficulty in identifying retrospective statutes and then distinguishing between

retrospective statutes that attract the presumption and those that do not.

9. At pp. 272-3 he identifies the principle that he postulates:

> ... that the presumption applies if the statute would attach a new duty, penalty or disability - that is to say, a prejudicial consequence - to a prior event. But when is a prejudicial law a consequence of an event, and when is it not? ...

10. Driedger examined a number of decisions to answer the question, one of which being the Queen v. Vine (1875), L.R. 10 Q.B. 195. At p. 273, he stated:

> In The Queen v. Vine, the statute considered there provided that:
>
> > Every person convicted of a felony shall forever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted. ...
>
> The question, as stated by Cockburn C.J., was whether a person who had been convicted of felony before the Act was passed became disqualified on the passing of the Act. There was no provision in the Act that could be construed as a rebuttal of the retrospective presumption.
>
> Cockburn C.J. held that the Act did apply. He said that "if one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony" he could feel the force of the argument in favour of applying the presumption. "But," he said, "here the object of the enactment is not to punish offenders, but to protect the public against the public houses in which spirits are retailed being kept by persons of doubtful character."
>
> He obviously construed the words "every person convicted of a felony" as referring to a status or characteristic only, and not to a past transaction. He also said "the words are in effect equivalent to 'every convicted felon'." Miller, and Archibald J.J. concurred, but Lush

> J. disagreed. He expressed the view that a person who had previously been convicted would forfeit his licence, and this was, therefore a highly penal enactment.
>
> The majority regarded the new disability as protection to the public, and not a new punishment, Archibald J. said "it is an enactment with regard to public and social order, and the infliction of the penalty is merely collateral." In his view the statute was retrospective, since he considered that a new disability was attached to past events. But on Cockburn's view, which, it is submitted, is the correct view, the statute was prospective only, since the fact-situation described in the statute was a characteristic that arose in the past and not a past event.

11. In Re a Solicitor's Clerk, [1957] 1 W.L.R. 1219, Lord Goddard C.J. said:

> It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

12. Driedger notes, at p. 275, that the case of In Re a Solicitor's Clerk was followed by the Manitoba Court of Appeal in Ward v. Manitoba Public Ins. Corp., [1975] 2 W.W.R. 53, where, under the statute and regulations there, additional premiums were assessed on the basis of convictions for offenses and it was held that the intent of the statute was to "deal with antecedent basic facts and apply them to prospective charges for insurance premiums." (Ibid., per Guy J.A. at pp. 55-56).

13. Driedger concluded, at pp. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.
>
> There can be differeces of opinion about the intent of the statute. In the case of R. v. Vine the majority held that the object of the statute was not to punish offenders but to protect the public; Lush, J. dissenting, said it was a highly penal enactment, and on his view the presumption would apply.

14. David H. Doherty, as he then was, in an article dealing with the prospective application of the Charter of Rights: "'What's done is done': an argument in support of a purely prospective application of the Charter of Rights" (1982), 26 C.R. (3d) 121, relied heavily on Driedger's article in arriving at his conclusions. At p. 127, he stated:

> Cases which have considered whether a statute operates on an existing status or characteristic borne out of a prior event, and is, therefore, prospective only, or operates to change the legal effect of a past event, and is, therefore retrospective, are difficult to reconcile.

Doherty notes that these cases are fully reviewed in Driedger and by Morden J.A. in Sanderson v. Russell (1979), 24 O.R. (2d) 429 (Ont. C.A.) at 436, where the Driedger article is referred to with approval.

15. An endeavour to articulate the difference between an existing status or characteristic borne out of a prior event and the operation of the statute to change the legal effect of a past event, is attempted by Doherty, ibid.:

> If the fact on which the operation of the statute depends is considered to be a status or characteristic which attached as a result of a prior event, but has continued to exist up to and after the date of proclamation, then there is no question of retrospectivity. The woman became a widow in the past but maintained that status after proclamation; just as the accused acquired the status of a prior offender prior to proclamation and maintained that status after the new status became law. It is the present status as opposed to the past event which is relevant to the application of the statute. The distinction is not without significance. If the statute is viewed as purely prospective there is no presumption against its application to a particular case where the relevant status or characteristic is acquired as a result of some prior event. If, to operate in a particular case, it must be viewed as having a retrospective effect on a prior event, then the litigant seeking to invoke that interpretation must overcome a presumption against retrospectivity. ...

16. At pp. 128, Doherty states:

> The Charter does not create a group or class of people who have a particular status as "infringed persons" as a result of some act which occurred prior to the enactment of the Charter. The description of those who may apply for relief under the Charter in s. 24 refers to people whose rights <u>as guaranteed by this Charter</u> have been infringed. It does not speak of people whose rights under previous laws have been infringed. It may usefully be compared to s. 236.1 [en. 1974-75-76, c. 93, s. 17] of the Criminal Code, R.S.C. 1970, c. C-34, which refers to those who have "previously been convicted", and to s. 83(1)(<u>d</u>) [en. 1976-77, c. 53, s. 3] of the Criminal Code, which refers to a group of people consisting of those who commit a second offence under s. 83 [en. 1976-77, c. 53, s. 3] and those who "prior to the coming into force of this subsection were convicted of an indictable offense..."
> (Emphasis in original)

17. Counsel for the Complainant relied on <u>R. v. Gamble</u>, [1988] 2 S.C.R. 595. The facts of that case are set out in the headnote, at pp. 596-97:

> In March 1976, the appellant's accomplice killed a police officer while they were in flight from a robbery. Nine

months later, appellant was convicted of first degree murder under s. 214 of the Criminal Code and was sentenced to life imprisonment without eligibility for parole for 25 years pursuant to s. 669(a) of the Code. Both sections were proclaimed in force on July 26, 1976 as part of a new criminal law (Criminal Law Amendment Act (No. 2), 1976, S.C. 1974-75-76, c. 105). On appeal, the Appellate Division of the Supreme Court of Alberta found that she should have been tried under the old provisions of the Criminal Code in force at the time of the offence. After comparing the old and new provisions, the Court concluded that appellant had been prejudiced by her trial under the new provisions but held that it was prevented from granting the remedy of a new trial under the old law because of the transitional provisions of s. 27(2) of the Criminal Law Amendment Act (No 2), 1976. The effect of these provisions was that the new trial and the punishment imposed in the event of conviction would be the same as if the offence had been committed after the coming into force of the amendment Act. The law applicable to the new trial would accordingly be the same as that applied at the previous trial. Appellant's application for leave to appeal to the Supreme Court of Canada was dismissed.

If the appellant had been found guilty of murder punishable by life imprisonment, as opposed to murder punishable by death, under the law in force before July 26, 1976, she would have been ineligible for parole for not more than 20 ears but also for not less than 10. In 1986, after 10 years of imprisonment in a penitentiary in Kingston, appellant made an application to the Supreme Court of Ontario for relief by means of a writ of habeas corpus ad subjiciendum with a writ of certiorari in aid and under s. 24(1) of the Canadian Charter of Rights and Freedoms. Appellant alleged that her continued detention pursuant to the 25-year parole ineligibility condition in her sentence violated s. 7 of the Charter and that she was entitled, under s. 24(1) of the Charter, to a declaration that she is now eligible for parole. The Supreme Court of Ontario dismissed the application and the judgment was affirmed by the Court of Appeal.

18. The decision holding that the appellant's s. 7 claim did not involve a retrospective application of the Charter was narrowly decided, with the judgement of Wilson J. being supported by Lamer J. and L'Heureux-Dubé J.; the dissenting judgement of the Chief

Justice being supported by Beetz J. The seemingly intractable difficulties in determining the question of retrospectivity of a statute are clearly delineated in the judgements.

19. At p. 622, Wilson J. states:

> The appellant alleges that her continued detention pursuant to the 25-year parole ineligibility condition in her sentence violates s. 7 of the Charter. She submits that she is entitled to a declaration (under s. 24(1) of the Charter) that she is now eligible for parole having spent 12 years in prison. The respondent argues that the Supreme Court of Ontario has no jurisdiction in this case, that the requested relief cannot be granted by way of habeas corpus, and that to grant the relief sought would constitute retrospective application of the Charter because, even if a breach of the principles of fundamental justice had occurred, it occurred well before the proclamation of the Charter.

20. Wilson J., ibid. asks:

> Will the application of the Charter in the circumstances of this case constitute a retrospective application of the Charter to events prior to its proclamation?

and

> Are the appellant's rights under s.7 of the Charter presently violated?

21. At p. 623, Wilson J. outlines the position of the appellant that she was not seeking a retrospective application of the Charter:

> ... The appellant suggests that the decision of this Court in R. v. Milne, [1987] 2 S.C.R. 512, is distinguishable in that she is not seeking a review of her pre-Charter trial and sentence in light of the standards contained in the Charter, but rather seeks review of and relief from the current operation of the parole ineligibility provision in her sentence. In short, the appellant submits that the Charter is being

applied prospectively to the continued operation of the parole ineligibility provision and asks this Court to focus its attention on the current operation and effect of the illegal parole ineligibility provision.

22. At pp. 625-627, Wilson J. states:

> ... the relevant act to which the Charter is applied would not be the conviction or sentencing but the continuing execution of that part of the sentence which mandates a 25-year period of parole ineligibility. In R. v. Stevens, [1988] 1 S.C.R. 1153, the majority of this Court adopted at p. 1158 the following formulation offered in R. v. James (1986), 27 C.C.C. (3d) 1 (Ont. C.A.), at pp. 21 and 25, aff'd [1988] 1 S.C.R. 669:
>
> > Tarnopolsky J.A., who delivered the judgment of the Court of Appeal, said that "one applies the law in force at the time when the act that is alleged to be in contravention of a Charter right or freedom occurs" and that "it is important that actions be determined by the law, including the Constitution, in effect at the time of the action." ...
>
> The minority in Stevens articulated a similar test for determining if an application of s. 7 was prospective or retrospective, stating at p. 1167:
>
> > Rather, the section seems to direct one to the point of time at which someone is about to be deprived of his or her life, liberty or security of the person. It is the projected deprivation which triggers the application of s. 7. We must ask therefore whether, at the time of the projected deprivation of the accused's right to liberty, that deprivation would be in accordance with the principles of fundamental justice or not.
>
> Under both the majority and the minority formulation in Stevens the crucial question becomes: what is the event which is alleged to be in contravention of the Charter? At what point in time does the event which deprives a person of his or her life, liberty or security of the person occur?
>
> In approaching this crucial question it seems to me preferable for the courts to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-Charter. Frequently an alleged current violation will have to be placed in the context of its pre-Charter

history in order to be fully appreciated. For example in considering delay before trial Martin J.A. of the Ontario Court of Appeal commented in R. v. Antoine (1983), 5 C.C.C. (3d) 97 (Ont. C.A.), at p. 102:

> Manifestly, s. 11(b) of the Charter applies only to trials taking place after it came into force, and it does not reach back and affect past trials. An enactment does not, however, operate retrospectively because a part of the requisites for its operation is drawn from a time antecedent to its coming into force, nor because it takes into account past events ....

Charter standards cannot be applied to events occurring before its proclamation but it would be folly, in my view, to exclude from the Courts consideration crucial pre-Charter history. Indeed, a review of such history will often be necessary when the Court exercises its broad discretion under s. 24(1) to formulate the remedy which is appropriate and just in the circumstances. As Martin J.A. noted at p. 104:

> Patently, s. 24 can be invoked only where a right guaranteed by the Charter is alleged to have been infringed, and I accept, of course, that there cannot be a breach of a new right conferred by the Charter prior to the creation of the right. For example, s. 10(b) of the Charter provides that everyone has the right on arrest "to retain and instruct counsel without delay and to be informed of that right". The words which I have italicized confer a new right. That right could not be contravened prior to the coming into force of the Charter because the right did no exist: see R. v. Lee (1982), 142 D.L.R. (3d) 574, 1 C.C.C (3d) 327, 30 C.R. (3d) 395 (Sask. C.A.). Where, however, there has been a breach of a right secured by the Charter it would be illogical to hold that the remedy provided by s. 24 for Charter contraventions does not apply merely because the proceeding in which the Charter right was contravened was initiated prior to the coming into force of the Charter, where the contravention occurred after the Charter came into effect.

A constitutional remedy to be fully appropriate and just may have to take into account pre-Charter events.

Another crucial consideration will be the nature of the particular constitutional right alleged to be violated. I would agree with the statement of Borins Co. Ct. J. in

R. v. Dickson and Corman (1982), 3. C.C.C. (3d) 23, at p. 29:

> Indeed, it may be that the Constitution defies strict doctrinal characterization as either exclusively retroactive, retrospective or prospective legislation for, as I suggested in the preceding paragraph, different facts may produce different interpretations. The operation of the Constitution in different cases will no doubt involve quite different considerations. (Emphasis in original)

23. Consistent with Wilson J.'s approach, she stated that: "Section 15 may also fall into this category" of "rights and freedoms in the Charter [that are] particularly susceptible of current application even although such application will of necessity take cognizance of pre-Charter events" (at p. 628) or they may not (at p. 629):

> Section 15 could not be used to invalidate a discrete pre-Charter act, namely a particular conviction. Likewise, in Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332, the appellants could not invoke their new rights of religious freedom under s. 2(a) of the Charter to invalidate their conviction for an offence committed before the coming into force of the Charter.

24. The key to understanding the reasons of Wilson J. is found at pp. 630-1:

> In Milne this Court rightly refused to apply "existing law" (p. 520) to a pre-Charter conviction and sentence which was proper according to the law in force at the time of the conviction and sentence or to apply the Charter so as to vitiate a sentence valid and proper at the time it was imposed. But that is not this case. The appellant's case is that the parole ineligibility provision in her sentence violates her liberty interest under s. 7 of the Charter and that the current ongoing operation of that provision is itself unlawful. This unlawfulness is part of the pre-Charter history, indeed a very significant part of it and has, in the appellant's submission, largely contributed to her current continuing unconstitutional detention.

25. Further at p. 639, Wilson J. states:

> Our earlier discussion of the retrospectivity issue also points up the importance of the way in which a Charter claim is framed. The appellant attacks her current detention as violating her constitutional rights. She does not attack her pre-Charter conviction and sentence. ...

26. Morden J.A., at p. 762, in McDonald and the Queen, cited above, stated:

> The respondent does not seek what he submits is a retroactive or retrospective application of s. 15, that is, he does not ask to have the steps taken in the proceedings against him before April 17, 1985, set aside or declared void. Rather he says that his submission involves an entirely prospective application of the Charter. He seeks only those benefits of the Young Offenders Act that would be applicable to the proceedings from April 17, 1985, forward. He submits that regardless of what the case was before April 17, 1985, there is now a situation of inequality that infringes s. 15 and that this situation requires a remedy. I believe that this argument is sustainable on the authorities.
>
> (Citations omitted)

27. Fundamental to a determination of the issue before me, is whether, on the facts, the Charter, operates on an existing status or characteristic borne out of a prior event and is therefore prospective only, or operates to change the legal effect of a past event, and is, therefore, retrospective.

28. On the facts of the case before me, counsel for the Complainant seeks to review the pre-Charter actions of YRBE, and in particular the incident which is the focus of the complaint:

> 7. On or about September 26, 1984, an Identification, Placement and Review Committee (I.P.R.C.) meeting was held. The committee identified Kathleen as a trainably mentally

> retarded child and recommended placement at Fairmead school.
> ...

29. In the Gamble case, unlike the case before me, the appellant was not (see p. 623) seeking a review of a pre-Charter event: in that case her pre-Charter trial and sentence in the light of the standards contained in the Charter. In the case before me, counsel for the Complainant is not asking me to "focus [my] attention on the current operation and effect of" YRBE's actions. Unlike the Gamble case, where the conviction would remain a lawful conviction, and the sentence would remain a sentence that was lawfully pronounced, with only the carrying out of the sentence being regarded as unlawful, I am asked to find some pre-Charter actions of YRBE to be contrary to the provisions of the Code in part because of the application of the Charter on a pre-Charter section of the Code.

30. All of the allegations contained in the written complaint relate to pre-Charter facts and it is the clear intention of counsel for the Complainant to have me declare that the actions of the Respondents established by those facts amount to a violation of the Code. In arriving at my decision, I am being asked to consider the application of section 15 of the Charter on the validity of section 16(1)(a) of the Code as it existed at the date of the IPRC decision.

31. In the circumstances of this case I do not regard the application of the Charter sought on behalf of the Complainant to be prospective. Rather, this is an example of a case where I am being asked to find that the Charter "operates to change the legal effect of a past event... " : The decision of the IPRC made on September 26, 1984. I find that the Complainant is attempting to apply the Charter retrospectively, and the application fails because of the presumption against such an application.

32. It might have been possible for the Complainant to have filed a further complaint based on the purely prospective application of section 15 of the Charter, but this was not done.

33. When the Complainant filed the amended complaint, dated March 13, 1986, adding Her Majesty the Queen in Right of Ontario, the Ministry of Education, there was no indication of an amendment involving the Respondent YRBE that could change my decision. Although Kathleen Lewis has a status or characteristic, in the case before me it is not the operation of the Charter on that existing status or characteristic borne out of a prior event that is material but the operation of the Charter to change the legal effect of a past event that occurred in September of 1984, as is made clear in the complaints.

34. I cannot accept the argument of counsel for the Complainant that the continuing refusal of YRBE to accept Kathleen Lewis into

an integrated kindergarten class after the 17th of April 1985 allows me to assume jurisdiction to apply s. 15 of the Charter. This is an attempt to, in effect, amend the complaint to allege incidents of discrimination that allegedly occurred at a time when the provisions of s. 15 of the Charter became applicable. See Gohm v. Domtar Inc. (January 20, 1988) (Ont. Bd. of Inquiry). The argument was presented in a manner familiar in labour arbitration cases where an objection to arbitrability is made based on an allegation that the grievance was filed beyond the time limits provided for in the applicable collective agreement. In such a case, where it can be established that there is a continuing grievance, the time limits will not have been breached and the objection will fail, subject to some other basis for treating the grievance as being inarbitrable, such as laches.

This is not such a case. The decision which YRBE is deemed to be bound by occurred in September of 1984, and it is that decision which formed the basis for the complaint. The effect of a ruling in favour of the Complainant would be to do indirectly what cannot be done directly.

35. It may be a matter of unfortunate timing, however, that is not enough to make s. 15 of the Charter applicable to the facts before me. The presumption against both retroactivity and retrospectivity is based on considerations of fairness. This rule of fairness is

referred to in R. v. James (1986), 27 C.C.C. (3d) 1 (Ont. C. A.) at pp. 21 (aff'd) [1988] 1 S.C.R. 669, where Tarnapolsky J.A. stated:

> One applies the law in force at the time when the act that is alleged to be in contravention of a charter of right or freedom occurs... [and] it is important that actions be determined by the law, according to the Constitution, in effect at the time of the action... .

This statement was approved of in Gamble and by the Supreme Court of Canada in R. v. Stevens, [1988] 1 S.C.R. 1153, at p. 1158.

36. If I were to accept the submission made by counsel for the Complainant, even if s. 15 of the Charter had only become operative in 1994, YRBE would be in violation of that section because of its actions taken in 1984. In the case before me, the decision that is impugned, as evidenced by the complaint, occurred in September of 1984. I do not understand counsel for the Complainant to be saying that he is not now attacking the decision made in September of 1984 and the right of YRBE to rely on the provisions of section 16(1)(a) of the Code as it existed at that time. From the extensive and detailed evidence adduced by counsel for the Complainant and the Comission, almost all of which focussed on the events leading up to the IPRC hearing, the hearing itself and its immediate aftermath, I understand counsel for the Complainant to be saying that he is relying on the refusal of YRBE to change its decision after April 15,1987 as the basis for applying the provisions of section 15 of the Charter to events prior to that date. Reliance on the alleged continuing refusal of YRBE to change its decision after April 17, 1985, was for the purpose of establishing a basis for my ruling

that the provisions of the noted section of the Code, which existed in September of 1984, contravened section 15 of the Charter, not only after April 17, 1985, when it came into force, but before that date. It is in this way that counsel for the Complainant proposed to deprive YRBE of the right to rely on section 16(1)(a) of the Code as it existed prior to the date of its repeal on April 18, 1988. If I accepted the position of counsel for the Complainant, YRBE would not be able to rely on section 16(1)(a) as it existed on April 17, 1985, nor could it rely on the provisions that repealed it and substituted it, at least until April 18, 1988.

This is not a case such as Gamble or McDonald referred to above, where the applicants were not endeavouring to apply existing law to a pre-Charter decision which may have been proper according to the law in force at the time of the decision. It is clear from the way the case for the Complainant is being presented that it is the intention to apply the provisions of section 15 of the Charter retrospectively, in that a request is also being made that the steps taken by YRBE prior to April 17, 1985 be set aside or declared void without resort by YRBE to the application of the provisions of section 16(1)(a) of the Code in force at the time.

37. Because I have found that the application of the Complainant fails, it is unnecessary for me to deal with any of the other grounds raised by the Respondent YRBE.

Dated at Toronto this 29th day of June, 1994.

M.R. Gorsky - Board of Inquiry